The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Systems Engineering Associates Corporation
File: B-228047, B-228904

Date: November 2, 1987

DIGEST

1. The General Accounting Office (GAO) will dismiss a protest where the matter is the subject of litigation. Where, however, the court stays the proceedings until the issuance of a GAO decision, GAO will provide the court with its views on the protest.

2. Where protester had requested the Department of Labor (DOL) approval in conforming a new labor classification but DOL had denied the request, the agency reasonably relied on the denial and properly found alternate proposals based on the rejected classifications unacceptable even though the protester was attempting to have the rejection overruled.

3. Agencies need not hold discussions with an offeror whose proposals are not acceptable or susceptible of being made acceptable.

DECISION

Systems Engineering Associates Corporation (SEACOR) protests the award of a contract to CFS Air Cargo, Inc. (CFS), under request for proposals (RFP) No. N00600-86-R-3361 issued by the Naval Regional Contracting Center, Washington, D.C. (NRCC), for support services for the Intra-Fleet Supply Support Operations Program (ISSOP) on the east coast. These services include on and off loading of ship repair parts, material inventories, and preparation of ships for deployment. SEACOR also protests the award of a contract to DynCorp under RFP No. N00600-87-R-2997, issued by the NRCC for similar support services for ISSOP on the west coast. We have consolidated the protests as they involve the same issues.

The protests are denied.

FACTS

SEACOR submitted three price offers for each RFP. Its basic proposals used the labor categories set out in the wage determinations included in the solicitations. SEACOR also submitted alternate proposals based on the use of a labor classification "material coordinator," not contained in the wage determinations. SEACOR's alternate proposals also included a supplement offering an apprenticeship program for material coordinators.

For the east coast RFP, SEACOR's basic price proposal was $44,420,376, its alternate proposal was $41,525,789 and its supplemented proposal was $40,455,217. On August 3, 1987, SEACOR states it received a letter from the Navy informing SEACOR that CFS had received the east coast award for a price of $43,087,739. The letter stated that SEACOR had not submitted the lowest cost acceptable offer.

SEACOR contends that its two alternate proposals which were lower priced than CFS' should have been considered by the Navy because the solicitation allowed offerors to propose conformed labor classifications such as material coordinator. Under 29 C.F.R. § 4.6(b)(2)(ii) (1987), the Department of Labor (DOL) has established procedures whereby a contractor may have a labor classification and wages, not contained in a Service Contract Act wage determination, conformed by DOL up to 30 days after the employee, or employees, performs any contract work.

In addition, SEACOR contends that since the solicitation stated that apprenticeship training programs approved by the Department of Labor (DOL) would be allowed, SEACOR's supplemental proposal which offered such a DOL approved program, should also have been considered. Since SEACOR's alternate and supplemental proposals were lower priced than CFS' proposal, SEACOR argues it should have received the award on the east coast contract and its offers should not have been rejected as unacceptable.

In response to the west coast RFP, SEACOR submitted three similar offers. However, only SEACOR's supplement to its alternate proposal, offering the apprenticeship training program, was lower than the awardee's price. SEACOR makes a similar argument here that since its supplemental proposal was lower than DynCorp's and since its proposal was technically acceptable, it should have received the award.

Subsequent to filing its two protests in this Office, SEACOR filed a complaint for judicial review and declaratory and injunctive relief in the United States District Court for the District of Columbia covering the same issues as

protested here. Systems Engineering Associates Corp., v. William E. Brock and James H. Webb, Jr., USDC DC Civil Action No. 87-2593. It has long been our policy to dismiss a protest where the matter is the subject of litigation before a court of competent jurisdiction unless the court requests our decision. See 4 C.F.R. § 21.9(a) (1987). On October 8, 1987, the court approved a consent order staying the proceedings pending our Office's issuance of a decision on the protests. In view of the court's order, we will consider these protests.

The Navy reports that award was made for both the east and west coast contracts on the basis of the lowest priced, technically acceptable offer and SEACOR's alternate proposals were properly rejected as being unacceptable. The Navy states that both solicitations contained the following provision at section L8:

> "The Government will accept alternate proposals for apprentice programs, however, programs must be fully approved by the Department of Labor which includes The Employment and Training Administration's Bureau of Apprenticeship and Training and The Employment Standards Administration's Wage and Hour Division. Approval of apprenticeship programs shall be accomplished prior to the closing date of the RFP."

In submitting its proposals SEACOR qualified both its alternate proposals on both RFP's as follows:

> "The contractors alternate proposal is based on applicable US Government agency approval of the Material Coordinator conformed position and hourly rate described in attachment (2), hereto."

SEACOR also qualified its supplemental proposals in both RFP's in the following manner:

> "Requirements of the Apprenticeship Training Program as defined by this solicitation conflict with the requirements of the Service Contract Act with regards to obtaining a conformed hourly rate. The solicitation requires that the contractor obtain a conformed rate prior to the effective date of the contract whereas the Service Contract Act specifically requires that the contractor submit a request for approval of conformed rates within 30 days after contract award."

The Navy states that SEACOR, while it was incumbent contractor on the prior west coast ISSOP contract, had attempted to conform the material coordinator classification but on June 3, 1986, DOL had denied conformance. SEACOR petitioned DOL's Board of Service Contract Appeals for review of the determination but no decision on the appeal has been rendered.

By letter dated May 6, 1987, the contracting officer requested best and final offers (BAFO) for the east coast RFP and in a letter to SEACOR identified the above quoted terms and conditions which were submitted as part of the alternate and supplemental cost proposals as being unacceptable. The Navy's letter also advised:

> "The Navy cannot accept SEACOR's Alternate Proposal. The Department of Labor's ruling of 23 June 1986 denying the classification of the 'Material Coordinator' labor category is still in effect."

SEACOR again submitted three different cost proposals which deleted the above quoted terms and conditions. However, SEACOR's alternate and supplemental proposals remained based on the same labor category, material coordinator, as originally proposed. The Navy subsequently determined that SEACOR's proposals were unacceptable.

TIMELINESS

The Navy argues that SEACOR knew its basis of protest upon receiving the contracting officer's May 6, 1987, letter identifying SEACOR's terms and conditions as being unacceptable. Since SEACOR did not file its protest with GAO until August 10, the Navy argues that SEACOR's protest is untimely under 4 C.F.R. § 21.2(a)(2) of our Bid Protest Regulations as it was not filed within 10 working days after the basis of protest was known.

To the extent that SEACOR is protesting the solicitation terms or the agency's rejection of SEACOR's terms of its initial proposal, we agree with the Navy that the protest is untimely. However, to the extent that SEACOR is protesting the awards, its protests are timely.

MERITS

We find the contracting officer acted reasonably in finding SEACOR's alternate proposals unacceptable because of the nonconforming labor classification. SEACOR's proposals were only low under both the east and west coast solicitations if it could utilize the material coordinator classification.

The contracting officer knew that the prior request for conformance had been denied by DOL under the previous contract with a similar wage determination. The instant solicitations cover the same performance requirements as SEACOR's prior contract. Therefore, no facts had changed between the DOL June 23, 1986, denial and the time the contracting officer found SEACOR's proposals unacceptable. Therefore, we find the contracting officer, who had before him the only decision issued by DOL, involving the same wage determination, same contract requirements and same nonconformed proposed labor classification, had a rational basis for his decision. To award a contract to SEACOR on one of its alternate proposals and then have DOL follow its prior decision regarding conformance would not have resulted in the lowest cost to the government when SEACOR had to pay the wages contained in its basic proposal. The RFP's stated that award would be made to the lowest priced technically acceptable offeror.

The fact that SEACOR had appealed the June 26 ruling does not alter the situation. The only expression by DOL on the conformance was the June 26 decision which could not be ignored, notwithstanding the pending appeal. CEBCO Construction, Inc., B-224932, Oct. 22, 1986, 86-2 C.P.D. ¶ 444 (appeal of an SBA regional office size determination does not preclude an agency from acting on the outstanding determination.)

Because SEACOR's low proposal on the west coast procurement was based on an apprentice program which would also use the above-discussed nonconformed rate, it is unnecessary to decide whether the apprentice program met the other required approval standards. This also disposes of SEACOR's contention that, on the west coast procurement, NRCC should have conducted discussions with SEACOR rather than making award on the basis of its initial proposals. Since SEACOR's basic proposal was not low and its alternate proposals were not acceptable, it was not necessary for the agency to conduct discussions. Midland Brake, Inc., B-225682, June 3, 1987, 87-1 C.P.D. ¶ 566.

The protests are denied.

for Seymour Efros
James F. Hinchman
General Counsel